No. 82-1412

Office-Supreme Court, U.S.
FILED
FEB 23 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC. d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Petitioners,

—against—

UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February 23, 1983

Questions Presented

1. The Union Pacific Railway was granted a railroad franchise and millions of acres of land by the United States under the Pacific Railroad Act of 1862 subject to obligations and limitations set forth, *inter alia,* in Section 3 of that Act. The Union Pacific Railroad succeeded to the railroad franchise and lands of the Union Pacific Railway through a mortgage foreclosure proceeding. The Court of Appeals for the Tenth Circuit held that as a result of the foreclosure, the Union Pacific Railroad took the land free from the obligations and limitations imposed by Congress in Section 3 of the Act. The first question for review is:

> Did the Court of Appeals correctly decide, notwithstanding this Court's rulings in *United States* v. *Northern Pacific Ry.,* 311 U.S. 317 (1940) and *Oregon & California R.R.* v. *United States,* 238 U.S. 393 (1915) and 243 U.S. 549 (1917), that as a result of the foreclosure proceeding the Union Pacific Railroad was no longer subject to the obligations and limitations imposed by Section 3 of the Pacific Railroad Act of 1862?

2. Wyoming, as well as 23 other states, has enacted the Federal Court State Law Certification Procedure Act, permitting federal courts to ascertain the answer to unresolved issues of state law by certifying those issues to the highest court of the State. An application was made to the Court of Appeals for the Tenth Circuit to certify an unresolved issue of Wyoming real property law to the Wyoming Supreme Court. Notwithstanding that the State of Wyoming had itself set forth its view in a related case that the issue should be certified and that the decision of the Wyoming Supreme Court, when it passed on the question, would

likely be contrary to that of the federal district court, the Court of Appeals refused to certify the issue and affirmed the ruling of the district court. The second question for review is:

> Should this Court, in the exercise of its supervisory power, review the refusal of the United States Court of Appeals to certify an unresolved question of Wyoming real property law to the Wyoming Supreme Court when the determination as to the nature of Wyoming law substantially affects recurring questions as to ownership rights to oil and natural gas on vast tracts of Wyoming land?

Parties Below

The parties participating below were Moench Investment Company, Ltd. ("Moench") and Thousand Peaks Ranches, Inc. ("Thousand Peaks"), appellants, and Union Pacific Land Resources Corp., Champlin Petroleum Company and Amoco Production Company, appellees.

Pursuant to Rule 28.1 of the Rules of this Court, the Court is informed that petitioner Moench, a limited partnership, own all of the outstanding stock of the petitioner Thousand Peaks. Thousand Peaks has no subsidiaries and no corporate affiliates other than Copper State Financial Corp., Burton-Hawks, Inc. and other corporations whose stock is wholly owned by Moench.

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IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Opinions Below

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 696 F.2d 88 and is set forth in the appendix to this petition commencing at p. 1a. The "Order Sustaining Motions for Summary Judgment and Summary Judgment" of the United States District Court for the District of Wyoming (Kerr, J.), affirmed by the Tenth Circuit, is reported at 495 F.Supp. 876 and is set forth in the appendix commencing at p. 11a.

Jurisdiction

The judgment of the Court of Appeals affirming the grant of summary judgment to respondents was filed on December 14, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) (1976).

Statutory Provisions

Sections 3 and 15 of the Pacific Railroad Act of 1862, ch. 120, 12 Stat. 489, as amended by Act of July 2, 1864, ch. 216, 13 Stat. 356, are reproduced in the statutory appendix commencing at p. 1s. The full text of the Wyoming "Federal Court State Law Certificate Procedure Act", Wyo. Stat. §§ 1-13-104 *et seq.* (1977), and Rule 11 of the Wyoming Rules of Appellate Procedure are set forth in the statutory appendix commencing at p. 4s.

Statement of the Case

In this case petitioners hold the undisputed right to and occupy the surface of certain parcels of land located in Wyoming, part of an oil-rich area of the Rocky Mountains. Petitioners and respondents, corporate subsidiaries of Union Pacific Corporation ("Union Pacific") and their lessee, Amoco Production Co. ("Amoco"), assert that they have title to the subsurface, including oil and gas, underlying those lands. Respondents' claim to title to the subsurface is based on the terms of 1908 and 1909 deeds from the Union Pacific Railroad to petitioners' predecessors in title, which purported to reserve "all coal and other minerals" to the Union Pacific Railroad.[1] Petitioners maintain

[1] These deeds resulted from installment-sale contracts entered into in 1897 and 1899.

that such reservations are invalid under Section 3 of the Pacific Railroad Act and hence that the Union Pacific Railroad conveyed the entirety of its interests notwithstanding the purported reservations. Petitioners also assert that, quite apart from the commands of Section 3, a reservation of "coal and other minerals" was not intended to, and under the circumstances present here did not, reserve to the Union Pacific Railroad oil and natural gas as a matter of Wyoming law.

Each of the parcels held by petitioners and at issue here is located on odd-numbered sections of the land grant originally made available by the United States to the Union Pacific Railroad (or its successors) to aid in the construction of a railroad to the Pacific under the Pacific Railroad Act of 1862 (hereinafter "The Act" or "The Pacific Railroad Act") (ch. 120, 12 Stat. 489, amended by Act of July 2, 1864, ch. 216, 13 Stat. 356). Known mineral lands, other than coal and iron lands, were excluded from the grant. Congress also specified, in a proviso to Section 3 (hereinafter sometimes referred to as the "settlement and preemption proviso"), that:

> "[A]ll such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." (A. 1a)[1]

Under the terms of both the Homesteading Act—passed only months prior to the Pacific Railroad Act—and the preemption laws, homesteaders and preemptors were to

[1] References to "A.—" are to the appropriate pages of the appendix to this petition.

receive titles in fee simple. Neither act authorized preemption or homesteading of either a mineral or surface estate carved out of the fee and no basis for preemption or homesteading of such a divided interest existed.

The original Union Pacific Railroad merged with a number of other lines, and the surviving entity was known as the Union Pacific Railway Company (the "Railway"). In 1893 a receiver was appointed for the Railway, and in a series of mortgage foreclosure proceedings in 1897-9, the railroad franchise and lands granted to the Railway by the Act ("land grant lands") were transferred to the Union Pacific Railroad (the "Railroad"). The principal consideration in the transfer in foreclosure consisted of bonds issued by the old Railway which were turned in by the holders thereof in exchange for stock in the new Railroad.[1] The Railroad continued to operate the business of the Railway without interruption and continued to receive land from the United States under the Act. The Act, by the terms of Section 15 thereof, extended to and bound "successors and assigns" of the original railroad company. (A. 3s)

Prior to 1884, when the Union Pacific Railway sold land grant land it did so without attempting to reserve any subsurface interests. In 1884 it began to reserve rights to prospect for coal and other minerals. During the period from 1897-1909 alone the Union Pacific Railway and Railroad used more than 30 differing subsurface reservation clauses in conveying the land. In some reservation forms, "oil" or "oil and gas" were explicitly reserved; in others, the words "oil" or "gas" were inserted by hand on a printed form providing for a reservation of only "coal and other minerals;" in still others, including all of the reservations

[1] The Union Pacific has itself referred to this process as a "reorganization." *See Union Pacific R.R.* v. *United States*, 524 F.2d 1343, 1363-66 (Ct. Cl. 1975) *cert. denied*, 429 U.S. 827 (1976).

at issue in this action, "coal and other minerals" were reserved with no reference, handwritten or otherwise, to "oil" or "gas."[4] The Railroad has taken the position, however, that each of the reservations, including the reservation of "coal and other minerals" without reference to "oil" or "gas," has identical legal effect and is sufficient to retain a fee interest in oil and natural gas.

According to the Railroad's calculation, it or its affiliates continue to hold both surface and subsurface rights to approximately one million acres of the original land grant. Additionally, in excess of 6,920,000 acres (including the lands at issue in this litigation) is asserted by the Railroad to be subject to one or another subsurface reservations and still held by Union Pacific or its affiliates.[5]

In 1969, Amoco contracted with the Railroad to engage in possible oil and gas exploration on the lands at issue. In the 115 years prior to the institution of this lawsuit the record reflects no drilling or other development of the subsurface of these lands by the Railroad or Amoco.

Proceedings Below

This diversity action (28 U.S.C. § 1332 (1976)) was commenced by respondents in the United States District Court

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[4] One computer record produced in a parallel action by Upland Industry, a Union Pacific subsidiary, includes more than sixty forms of reservations used by the Railway or Railroad. The form reflects 26 different forms of reservations of "coal and other minerals." An entirely separate grouping of 17 reservations is headed "oil, coal and other minerals." Some of these refer explicitly to natural gas. A listing of the more than sixty differing forms of reservations as reflected in the Union Pacific's records is set forth in the Appendix at p. 25a.

[5] Brief of Appellees Union Pacific Land Resource Corporation and Champlin Petroleum Company, submitted to The Tenth Circuit at p. 30, n. 2; Summary of Upland Industry Holdings (1977). (A. 27a)

for the District of Wyoming in June, 1979. Petitioners answered and counterclaimed, asserting the invalidity of the subsurface reservations under Section 3 of the Pacific Railroad Act, an Act whose interpretation had been put at issue by the complaint. Several months previously, the petitioners had commenced their own quiet title action in the Wyoming state courts which raised the same issue of Wyoming law (theretofore and to this date undecided by the Wyoming courts) as to the correct interpretation of a reservation of "coal and other minerals." Union Pacific and Amoco removed the earlier commenced state action to the Wyoming district court where it was assigned to the Judge (Hon. Ewing T. Kerr) hearing this case and where it was stayed pending the resolution of this case.

In January, 1980, respondents moved for summary judgment; the district court granted the motion in a brief memorandum decision in August, 1980.[6] (A. 11a) The district court disposed of the Wyoming law issue as to the proper interpretation of the reservations of "coal and other minerals" by relying on its own earlier decision in which it had held such reservations to be unambiguous under Wyoming law as to the inclusion of oil and gas and hence not to be subject to construction through extrinsic evidence. *Amoco Production Co.* v. *Guild Trust*, 461 F.Supp. 279 (D.Wyo. 1978), *aff'd*, 636 F.2d 261 (10th Cir. 1980), *cert.*

[6] Petitioners opposed the motion, *inter alia*, as premature, noting that discovery was ongoing in a series of prior-commenced actions involving these parties, among others, pending in the United States District Court for the District of Utah which raised the issue of the validity of the subsurface reservations under Section 3 of the Act as well as issues of Utah law. *Anschutz Land and Livestock Co.* v. *Union Pacific R.R.*, No. C-77-0390(J) (D. Utah); *Antelope Island Cattle Co.* v. *Union Pacific Corp.*, No. C-77-0389(J) (D. Utah). Leave was sought to incorporate discovery material from those actions in this and to defer acting on summary judgment until such time as discovery was completed in the Utah actions. The district court did not rule on these requests prior to granting the motion for summary judgment.

denied, 452 U.S. 967 (1981) (*"Guild I"*). In that decision the district court, while acknowledging that the Wyoming Supreme Court had not interpreted this type of reservation, adopted a rule excluding all extrinsic evidence.

In its disposition of the instant case, the district court recognized that its earlier decision in *Guild I* had not dealt with the impact of the settlement and preemption proviso of Section 3 of the Pacific Railroad Act. Petitioners argued that by selling surface rights in the land, while at the same time purporting to retain mineral or other subsurface rights, the Railroad had acted in a manner inconsistent with Section 3; that the purported subsurface reservations were consequently invalid and that a full fee interest had passed as a matter of law. The district court disposed of the Section 3 argument in a single sentence (A. 13a) by reference to two decisions of this Court, neither of which was directed to an interpretation of the settlement and preemption proviso.[7]

An appeal was taken to the Tenth Circuit, which was also asked to certify the question of Wyoming law to the Wyoming Supreme Court pursuant to the Wyoming "Federal Court State Law Certificate Procedure Act." The Tenth Circuit affirmed the decision granting summary judgment and did not certify the disputed question of Wyoming law to the Wyoming Supreme Court.

The Court of Appeals provided a somewhat more detailed explanation for rejecting petitioners' argument as to Section 3 of the Pacific Railroad Act than had the district court. After discussing the possible effect of the requirement of Section 3 that the railroad sell or dispose of the lands within the specified period or hold them open to

[7] The decisions were *Burke* v. *Southern Pacific R.R.*, 234 U.S. 669 (1914) and *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979).

settlement and preemption, the court held that the provision had been satisfied and that the reservations were valid because "the lands at issue *were* 'sold or disposed of . . . within three years' of the railway's completion" (emphasis in original). 696 F.2d at 92. (A. 8a) The basis for this conclusion was that "the lands were in fact sold upon foreclosure of the mortgages" and that the lands consequently "were not then and are not now subject to the settlement and preemption clause." *Id.*

The Court of Appeals did not cite or otherwise refer to this Court's holding in *United States* v. *Northern Pacific Ry.*, 311 U.S. 317 (1940), in which the Court held a settlement and preemption clause had been violated notwithstanding a similar foreclosure transfer. Nor did the court even advert to the decisions of this Court in *Oregon & California R.R.* v. *United States*, 238 U.S. 393 (1915) and 243 U.S. 549 (1917), in which, in the context of construing other railroad land grant statutes, this Court had expressly rejected the contention that "the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos." 238 U.S. at 435. These cases had been briefed and argued to the court by both petitioners and respondents.

Similarly, although recognizing both that "Wyoming substantive law governs" the interpretation of the subsurface reservations (696 F.2d at 93) (A. 10a) and that "no Wyoming state court has passed upon the issue" (*id.*) the court declined, without explanation, to certify the issue to the Wyoming Supreme Court. Instead, basing its decision explicitly on the district court's interpretation of the reservation in the earlier *Guild I* case, *supra*, and its own affirmance thereof, the Court of Appeals again proceeded to offer its "Erie-guess" as to how the Wyoming courts would resolve the matter. The court did not note that a

motion for certification and/or abstention had been made, as well, in the earlier *Guild I* case to which petitioners were not parties. Nor did it note that the State of Wyoming had emphasized, in support of that motion that:

> "Resolution of the issues presented in this case will directly affect title to the mineral estate of lands owned by the State of Wyoming and thousands of its citizens. It would be difficult to conceive of an issue that has greater bearing or interest to the State of Wyoming than the ownership of real property within its borders. Clearly, the issue presents a substantial question of public policy and concern and the exercise of federal jurisdiction could be disruptive of the State's efforts to establish a coherent, uniform policy and method of even handed, intelligent regulation of ownership of vital resources such as oil and gas. As noted in Appellant's memorandum, conservation and revenue production are major concerns to the State. The question is basic: ownership of Wyoming real property." (A. 19a-20a)[8]

The brief submitted on behalf of the State of Wyoming pointed out that a Wyoming court could finally resolve the real property issue, whereas a federal "forecast" was "not of controlling precedential value" and could not provide "the benefit of stability, uniformity and certainty in an area of law that directly, substantially and vitally affects" the "lives and fortunes" of the "State of Wyoming and its citizens." (A. 20a) The Wyoming brief then stated:

> "It is the opinion of the State that if given an opportunity to decide such questions, the Supreme Court

[8] A copy of this brief and the motion of the State of Wyoming for leave to file it in support of a motion for abstention or, in the alternative, for certification are included in the Appendix to this petition commencing at p. 15a.

> of the State of Wyoming would likely differ from the decision of the District Court below in this case." (A. 23a)

Without explanation, the Tenth Circuit denied Wyoming leave even to file its brief in *Guild I* and denied the motion for certification in that case, as in this.

The Court of Appeals' decision in this case was filed on December 14, 1982. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

The Tenth Circuit's Decision Resolves An Important Question of Federal Statutory Interpretation Affecting Title to Millions of Acres of Western Land in a Manner Inconsistent With This Court's Decisions in *United States* v. *Northern Pacific Ry.* and *Oregon & California R.R.* v. *United States.*

It was petitioners' contention before the Court of Appeals, as it is here, that the settlement and preemption proviso of Section 3 of the Pacific Railroad Act of 1862, as amended in 1864, renders invalid the attempt of the Union Pacific Railway and its successor to retain the subsurface of land grant lands made available under Section 3 of the Act. That proviso required:

> "[A]ll such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." (A. 1s)

The Court of Appeals considered the argument and rejected it on the ground that the clause had been complied with here, *i.e.*, that the transfer of the land grant lands from the Union Pacific Railway to the Union Pacific Railroad as a part of the foreclosure of mortgages on the Railway, constituted the sort of sale which freed the Railroad of the obligations and limitations of the Section 3 proviso of the Act. 696 F.2d at 92-93. (A. 8a-9a)

The Court of Appeals recognized that this question had not been decided in this Court's examination of the settlement and preemption proviso of the Pacific Railroad Act in *Platt* v. *Union Pacific R.R.*, 99 U.S. 48 (1878). 696 F.2d at 92. (A. 8a) However, the court neither discussed nor otherwise considered decisions of this Court in which other railroads had urged upon this Court precisely the argument offered by respondents here in connection with their land grant statutes—nor that in each case the railroad's argument had been rejected and the successor railroad held bound to fulfill the limitations imposed upon it by Congress notwithstanding the transfer through mortgage foreclosure proceedings. It is these circumstances and the importance of the question of title to the subsurface underlying millions of acres of land grant lands in the West which make this issue one worthy of review by this Court.[9]

* * *

[9] *See Leo Sheep Co.* v. *United States*, *supra*, 440 U.S. at 678 ("Because this holding affects property rights in 150 million acres of land in the Western United States, we granted *certiorari*"); *Andrus* v. *Utah*, 446 U.S. 500, 506 (1980) ("Because the dispute between the parties involves a significant issue regarding the disposition of vast amounts of public lands, we granted *certiorari*.")

The workings of the various railroad land grant acts have been a frequent and continuing source of litigation before this Court. *See Leo Sheep Co.* v. *United States*, *supra*; *United States* v. *Union Pacific R.R.*, 353 U.S. 112 (1957); *Great Northern Ry.* v. *United States*, 315 U.S. 262 (1942); *United States* v. *Northern*

The Pacific Railroad Act of 1862, as amended in 1864, provided the framework for construction of a transcontinental railroad; it also established the terms for the distribution of millions of acres of theretofore public lands first to the new railroad created under the Act and thence—or at least so Congress envisioned—to others who would develop those lands.

Congress was acutely concerned about allowing millions of acres of the land to repose in the railroad corporation authorized under the Act. Put simply, as this Court has recognized, there existed a clear "governmental policy of guarding against monopolies of public lands by large corporations or single individuals." *Platt* v. *Union Pacific R.R., supra,* 99 U.S. at 64.[10] In 1872 this Court noted of the Act:

Pacific Ry., 311 U.S. 317 (1940); *Southern Pacific Co.* v. *United States*, 307 U.S. 393 (1939); *Central Pacific Ry.* v. *Alameda County*, 284 U.S. 463 (1932); *Fullinwider* v. *Southern Pacific R.R.*, 248 U.S. 409 (1919); *Oregon & California R.R.* v. *United States*, 243 U.S. 549 (1917); *Oregon & California R.R.* v. *United States*, 238 U.S. 393 (1915); *Burke* v. *Southern Pacific R.R., supra; Missouri Valley Land Co.* v. *Wiese*, 208 U.S. 234 (1908); *Northern Pacific Ry.* v. *Soderberg*, 188 U.S. 526 (1903); *Tarpey* v. *Madsen*, 178 U.S. 215 (1900); *Northern Pacific Ry.* v. *Myers*, 172 U.S. 589 (1899); *Menotti* v. *Dillon*, 167 U.S. 703 (1897); *Barden* v. *Northern Pacific R.R.*, 154 U.S. 288 (1894); *Deseret Salt Co.* v. *Tarpey*, 142 U.S. 241 (1891); *Kansas Pacific Ry.* v. *Dunmeyer*, 113 U.S. 629 (1885); *Platt* v. *Union Pacific R.R., supra; United States* v. *Union Pacific R.R.*, 98 U.S. 569 (1878); *Missouri, Kansas and Texas Ry.* v. *Kansas Pacific Ry.*, 97 U.S. 491 (1878); *Railway Co.* v. *McShane*, 89 U.S. 444 (1874).

[10] The Court's understanding of the congressional intent was well founded in legislative history. The settlement and preemption proviso was designed specifically to avoid a perpetual retention by the railroad of the lands granted to it by the United States. This objective was clearly articulated by one of the supporters of the Pacific Railroad Act, Senator Pomeroy, who was the co-author of this proviso. In debating whether or not to include a similar provision (which ultimately was adopted) in proposed legislation pertaining to the Northern Pacific railroad line,

"It is wisely provided, that these lands shall not be used by the company as a monopoly of indefinite duration. The policy of the government has been for years to encourage settlement on the public land by the pioneers of emigration, and to this end it has passed many laws for their benefit. This policy not only favors the actual settler, but it is to the interest of those who, by purchase, own adjacent lands, that *all of it* should be open to settlement and cultivation. Looking to this policy, and to the very large quantity of lands granted by this statute to a single corporation, Congress declared that if the company did not sell those lands within a time limited by the act they should then, without further action of the company, or of Congress, be open to the actual settler under the same laws which govern the right of preemption on government lands, and at

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Senator Pomeroy responded to his colleagues' concern that a land grant would unduly aggrandize the proposed railroad by discussing the operation of the Pacific Railroad Act:

"What were the conditions of [the Pacific Railroad Act] land grant? The Senator says they make a monopoly which [the Railroad] will hold from generation to generation. I wish to read one of the provisions of that law . . . [quoting the settlement and preemption proviso] . . . .

* * *

"That road has now been completed two years; . . . every acre which remains unsold three years after that road is completed is subject to preemption and settlement like other public lands . . . . Where is the opportunity for a company to grow up as a great-land monopoly under such a provision as this?

* * *

"But I submit that the old provision which I insisted upon in the Pacific railroad act, and which I will read again—[quoting the settlement and preemption proviso] will prevent any landed monopoly of a railroad company. They have got to find settlers to take the lands within three years after the road is completed; and if they do not do that, then they are to be open to settlement at $1.25 an acre." Cong. Globe, 41st Cong., 2d Sess. 2483-84 (1870).

> the same price. Any one who has ever lived in a community where large bodies of lands are withheld from use, or occupation, or from sale except at exorbitant prices, will recognize the value of this provision. It is made for the public good, as well as for that of the actual settler." *Railway Co.* v. *Prescott*, 83 U.S. 603, 609 (1872) (emphasis in original)[11]

And in 1878, in the *Platt* decision, this Court, while emphasizing that the dominant purpose of the Act was to have "the road constructed, and constructed with the aid of the land grant" (99 U.S. at 65), reaffirmed that Congress was "guarding against" the creation of "monopolies of public lands" when it enacted the settlement and preemption proviso to Section 3 of the Pacific Railroad Act. *Id.* at 64. In no decision has it ever been suggested that an interpretation of the Pacific Railroad Act which totally ignored the long-established Congressional aversion to monopolization of the land by the railroad was sustainable.

That the concern of Congress lest a railroad or its successors monopolize in perpetuity the land granted it was well founded is illustrated by the facts which form the backdrop to the Section 3 issue presented here. The Union Pacific and its subsidiaries continue to hold approximately one million acres of the land grant outright and, as of 1977, asserted claims to the subsurface on nearly another seven million acres—more than one third of the original land grant. The question posed by this case is whether the purported retention of subsurface rights is consistent with the

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[11] *Prescott* was later overruled with respect to the issue of state taxation of lands in *Railway Co.* v. *McShane, supra.* Nothing in *McShane* takes issue with *Prescott's* statement of Congress' intent that the Pacific Railroad Act not result in the creation of a railroad land monopoly.

commands of the settlement and preemption clause under which those lands came to the Railroad.[12]

The terms of that proviso are clear. The Union Pacific Railroad and its successors were given two choices:

> "While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or preemption; after three years have elapsed, the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain—the price not exceeding $1.25 per acre, being payable to the company instead of the government." *Union Pacific R.R.* v. *McShane*, 24 F. Cas. 640, 643 (C.C.D. Neb.) (No. 14,382), *aff'd*, 89 U.S. 444 (1874).

Congress, while not compelling the railroad to sell the land, thus provided it with a clear financial incentive to do so by means of this two-pronged choice: selling within three years or running the risk of settlement and preemption thereafter. What Congress did not do was create a third option of selling the surface and retaining the subsurface, thus frustrating the workings of the proviso. Neither the preemption laws nor the Homesteading Act (the latter

[12] This Court's decision in *Leo Sheep*, *supra*, relied upon by the district court but not the Court of Appeals, in no way limits the interpretation of the proviso put forth by petitioners. The Court there refused to apply the common law doctrine of "easement by necessity" or an unfocused congressional intent to create an easement of access without reference in the Act. Here petitioners do not seek to advance any unrelated common law doctrine or to apply an abstract intent without reference to the specific statutory language. Instead petitioners seek to apply the language of the Act itself to serve the purposes of the very proviso at issue.

passed by the same Congress just months before the Pacific Railroad Act), provided for settlement or preemption of a subsurface estate, but only of an entire fee. *See Shaw* v. *Kellogg*, 170 U.S. 312 (1898). Were the Railroad's efforts to divide the land by sale into separate surface and subsurface estates sanctioned, and the frustration of settlement and homesteading during the period they were available thus confirmed, the Railroad finally would have completed its effort to circumvent the law, having acquired a permanent estate in the land grant without ever having exposed the land to the risk of settlement and preemption which Congress commanded under the settlement and preemption proviso.[13] The attempt to retain a subsurface estate by the Railroad is plainly invalid.

The Court of Appeals in this case recognized that where the land grant lands had not been sold or disposed of within three years "a settler seeking land under Section 3 might well be entitled to the entire fee." 696 F.2d at 92. (A. 7a-8a)[14] The court concluded, however, that the issue was

[13] Responding to a similar threat that action by a railroad would preclude ultimate compliance with the requirements of a land grant proviso by dividing mineral or timber from the surface interests, this Court affirmed an injunction against the Oregon & California Railroad precluding it from separating timber or minerals (coal and iron) from the rest of the property. It precluded sale of such timber or minerals " 'except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.' " *Oregon & California R.R.* v. *United States*, *supra*, 243 U.S. at 561.

[14] The Court of Appeals expressed doubt whether the railway or its successors would be obliged to sell the entire fee to entities other than settlers or preemptors claiming under those acts. 696 F.2d at 92. (A. 7a-8a) This dictum misses the point. Certainly petitioners do not claim to be homesteaders or preemptors, nor that their predecessors acquired the lands by settlement or preemption. But the invalidity of the purported reservation in no way turns on petitioners' status. The point is simply that if, as the Railroad now claims, it sold less than a fee interest to petitioners' predecessors, then the lands would not have been "sold" in

irrelevant because the lands at issue here *had been* "'sold or disposed of . . . within three years' of the railway's completion" (696 F.2d at 92) (A. 8a) when they were "sold upon foreclosure of the mortgages" placed on the lands by the Railway. *Id.*

The Court of Appeals cited no decision in support of its interpretation of the term "sold or disposed of." It recognized that *Platt* had held that no obligation to make railroad lands available for settlement or preemption existed so long as the mortgage remained in place, but also acknowledged that the Court in *Platt* had "specifically declined to consider 'whether the lands covered by the mortgage will not be open for preemption, if they shall remain unsold after the mortgage shall be extinguished.'" 696 F.2d at 92. (A. 8a)

But, as the Court of Appeals failed to note, the claim that the transfer of a railroad's interest in the land grant in mortgage foreclosure proceedings constituted a sale or disposition for purposes of satisfying a settlement and preemption proviso was hardly a new one. It had, in fact, previously been considered and rejected by this Court. In *United States* v. *Northern Pacific Ry., supra,* the Court was called upon to decide whether or not the Northern Pacific Railway "had failed to comply with the obligation" imposed by an 1870 Joint Resolution of Congress "pertaining to the disposition of the lands by settlement and preemption." 311 U.S. at 367. The Northern Pacific Railway had acquired its claim to the land grant lands in an 1896

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their entirety yet could never have been subject to settlement and preemption, since it was impossible to settle or preempt less than a fee estate. For this reason the purported reservations in the sales to petitioners' predecessors were inconsistent with and void under the settlement and preemption proviso and the Railroad, as a matter of law, necessarily conveyed its full fee interest when it sold its land grant lands.

mortgage foreclosure proceeding. This Court described the status of the entity before it in terms which, were the Union Pacific's name substituted, might well have been used to describe Union Pacific in this case:

> "The corporation chartered by Congress [the Northern Pacific Rail*road*] operated the road until receivers were appointed in 1893. Pursuant to foreclosure proceedings the Northern Pacific Rail*way* Company acquired title to the railroad, the land grant, and all other property of the original corporation and has since operated the road and obtained patents for millions of acres under the land grants." 311 U.S. at 328 (emphasis supplied).

The Northern Pacific Railway had argued, as the Union Pacific does here, that "the proviso does not apply to the Railway Company which purchased the lands at the foreclosure sale in 1896 . . . ." Brief for Appellees before the United States Supreme Court in *United States* v. *Northern Pacific Ry.* at 121; *see also id.* at 123. Notwithstanding this argument, this Court held the successor Northern Pacific entity was liable for violation of the settlement and preemption proviso. 311 U.S. at 368-69.[15]

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[15] The settlement and preemption proviso in *Northern Pacific* applied not only to lands "not sold or otherwise disposed of" within the prescribed time after completion of the railroad, but also to lands that "remain subject to the mortgage by this Act authorized." Based on this additional language, this Court in *Northern Pacific* concluded that Congress intended that settlement or preemption might proceed under the Northern Pacific Act even if a mortgage were in place. Seizing on the additional language in the Northern Pacific proviso, the Union Pacific urged below that this Court's decision in the context of a mortgage *foreclosure* in *Northern Pacific* was distinguishable here. The Union Pacific did not articulate why the words "sold" or "disposed of," identical in each statute, should be given inconsistent meanings; nor could it explain how the fact that settlement and preemption had been held to be "stayed" by a mortgage under

Nor is *Northern Pacific* the only decision of this Court to deal with the impact of mortgage foreclosure on the obligations of a railroad with respect to disposition of land grant lands. In the two *Oregon & California R.R.* decisions, the Court was called upon to interpret an 1869 proviso which limited sales to "actual settlers." *Oregon & California R.R.* v. *United States,* 238 U.S. 393 (1915) and 243 U.S. 549 (1917). In a suit by the United States challenging the railroad's failure to comply with the provision, it was urged by the successor railroad and various mortgagees that the sale upon foreclosure of the lands eliminated the obligations imposed by the proviso. This Court firmly rejected the contention. While recognizing that the proviso, like that at issue here, left the decision as to whether or not to sell at all in the railroad's hands, it noted the statutory limits on that discretion, concluding that the railroad

> "might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and *we say 'restrictions imposed' to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos.*" 238 U.S. at 434-35 (emphasis added).

See also 243 U.S. at 554-55.

The holding below is plainly inconsistent with these decisions. This Court should grant the petition to review the question of the validity of subsurface reservations under Section 3 of the Pacific Railroad Act.

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the Union Pacific Act in *Platt, supra,* and not stayed under the Northern Pacific Act, bore at all on the issue of whether the foreclosure of the mortgage and the resulting transfer of the lands to a successor railroad company satisfied the "sale" requirements of either act. The court below addressed none of these issues.

II.

The Repeated Refusal of the Tenth Circuit to Certify to the Wyoming Supreme Court a Concededly Undecided Question of Wyoming Real Property Law Notwithstanding the Opinion of the State of Wyoming That the Federal District Court's Prediction as to Wyoming Law, Relied Upon by the Court of Appeals, Would Likely Prove Erroneous, Offends Principles of Federalism and So Far Departs from the Accepted and Usual Course of Judicial Proceedings as to Warrant Review by This Court.

No issue is as fundamentally unique to American jurisprudence and none of late has been as much debated as the proper allocation of decision-making authority between the state and federal courts in a federal system.[16] The difficulties inherent in federal court adjudication of undecided questions of state law are, of course, well known. "Federal courts have no expertise in the application of state law and are particularly disadvantaged when a diversity suit requires the decision of a point not settled by the state

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[16] The subject has been central in the on-going debates concerning the abolition or limitation of federal diversity jurisdiction in which state and federal jurists, academicians and practitioners have been engaged. *See, e.g.*, Burger, *1982 Year End Report on the Judiciary* at 4-5; O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801, 811-14 (1981); Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231 (1976); Sheran and Issaacman, *State Cases Belong In State Courts*, 12 Creighton L.Rev. 1, 58-60 (1978); ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* (1969); H. Friendly, *Federal Jurisdiction: A General View* 142-43 (1973), Haynesworth, Book Review, 87 Harv. L. Rev. 1082, 1089-90 (1974); D. Shapiro, *Federal Diversity Jurisdiction: A Survey and Proposal*, 91 Harv. L. Rev. 317 (1977). *Compare* Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317 (1967) *with* Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 Texas L. Rev. 1 (1964).

courts." Bork, *supra*, 70 F.R.D. at 237; *see also* Burger, *supra* at 4-5; Haynesworth, *supra*, 87 Harv. L. Rev. at 1089; Friendly, *supra* at 99-100; *see also ALI, supra* at 100. The determination by a federal court sitting in a diversity case of an unsettled question of state law is at best a "tentative and indecisive judgment" which may be definitively contradicted by the state court of last resort when it considers the question. *Sutton* v. *Leib*, 342 U.S. 402, 413 (1952) (Frankfurter, J., concurring). *Cf. Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 484 (1940).

In some cases, of course, "Erie guessing" is a necessary reality of diversity jurisdiction. But in Wyoming, as in twenty-three other states and Puerto Rico,[17] the procedural tool of certification by the federal court to the state supreme court exists to avoid these uncertainties and to minimize tensions in federal-state relations. This Court has en-

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[17] The following states (as well as Puerto Rico) have adopted the Uniform Certification of Questions of Law Act or some variant thereof: Alabama, Ala. R. App. P. 18, 2 Ala. Code, Ala. Const. Amend. 328 (1975); Colorado, Colo. App. R. 21.1; Florida, Fla. R. App. P. 9.150, Fla. Stat. Ann. § 25.031 (West 1974); Georgia, Ga. Sup. Ct. R. 36, Ga. Code Ann. § 15-2-9 (1982); Hawaii, Hawaii Rev. Stat. § 602-5 (Supp. 1981), Hawaii Sup. Ct. R. 20; Idaho, Idaho App. R. 12.1; Indiana, Ind. Code Ann. § 33-2-4-1 (Burns 1975), Ind. R. App. P. 15(O); Iowa, Iowa Code Ann. §§ 684A.1 to 684A.11 (West Supp. 1982-83); Kansas, Kan. Stat. Ann. §§ 60-3201 to 60-3212 (Supp. 1981); Kentucky, Ky. R. Civ. P. 76.37; Louisiana, La. Rev. Stat. Ann. § 13:72.1 (West Supp. 1982), La. Sup. Ct. R. 12; Maine, Me. Rev. Stat. Ann. tit. 4, § 57 (Supp. 1982-83), Me. R. Civ. P. 76B; Maryland, Md. Cts. & Jud. Proc. Code §§ 12-601 to 12-609 (1980); Massachusetts, Mass. Sup. Jud. Ct. Gen. R. 1:03; Minnesota, Minn. Stat. Ann. § 480.061 (West Supp. 1983); Montana, Mont. Sup. Ct. R. 1; New Hampshire, N.H. Appendix R. 21 to N.H. Rev. Stat. Ann. § 490 (1968); New Mexico, N.M. Stat. Ann. § 34-2-8 (1981); North Dakota, N.D. R. App. P. 47; Oklahoma, Okla. Stat. Ann. tit. 20, §§ 1601 to 1612 (West Supp. 1982-83); Puerto Rico, P.R. Sup. Ct. R. 27; Rhode Island, R.I. Sup. Ct. R. 6; Washington, Wash. Rev. Code Ann. §§ 2.60.010 to 2.60.900 (Supp. 1982); West Virginia, W. Va. Code §§ 51-1A-1 to 51-1A-12 (1981); Wyoming, Wyo. Stat. §§ 1-13-104 *et seq.* (1977), Wyo. R. App. P. 11.01 to 11.07.

thusiastically embraced the advent of state certification statutes such as the one adopted by Wyoming:

> "[The certification procedure] in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers* v. *Schein*, 416 U.S. 386, 390-91 (1974) (footnote omitted).

So stating, this Court vacated the opinion below and remanded to the Second Circuit with directions to consider whether to certify a controlling issue of state law to the Florida Supreme Court. After the Florida Supreme Court answered the questions certified to it (313 So.2d 739 (Fla. 1975)), the Court of Appeals reversed its previous decision. *Schein* v. *Chasen*, 519 F.2d 453 (2d Cir. 1975) (*per curiam*). *See also Clay* v. *Sun Insurance Office Ltd.*, 363 U.S. 207 (1960); *Mills* v. *Rogers*, 102 S.Ct. 2442, 2452 (1982) (Court of Appeals' decision vacated to permit consideration of certification by First Circuit to Massachusetts Supreme Judicial Court); *Zant* v. *Stephens*, 102 S.Ct. 1856 (1982) (*per curiam*) (certification by this Court to Georgia Supreme Court). The availability of such a procedure has been greeted with enthusiasm by courts and commentators alike.[18]

While recourse to certification has been viewed as discretionary (*see Lehman Bros.* v. *Schein, supra*, 416 U.S. at 390-91), the circumstances of this case make plain that the refusal to certify warrants review in order that the

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[18] *See, e.g.*, Justice Frankfurter's reference in *Clay, supra*, to the enactment of the Florida certification statute as representing "rare foresight," 363 U.S. at 212; *see also Gates Rubber Co.* v. *USM Corp.*, 508 F.2d 603, 605 n.3 (7th Cir. 1975) (Stevens, J.) ("We regret that Illinois has not established a procedure, as has Indiana, which would enable us to obtain definitive answers to the questions of Illinois law from the tribunal with final authority to answer those questions.")

federal appellate courts may be given guidance in this sensitive area of state/federal relations.

In this case, the Tenth Circuit was asked by motion to certify to the Supreme Court of Wyoming under the Wyoming "Federal State Law Certificate Procedure Act," Wyo. Stat. §§ 1-13-104, *et seq.* (1977); and Wyo. R. App. P. 11.01 to 11.07 (A. 4s-7s) a question as to the meaning under Wyoming law of "coal and other minerals" in turn of the century deeds.[19] The Court of Appeals recognized that "no Wyoming state court has passed upon the issue" (696 F.2d at 93) (A. 10a) but added that

> "a Wyoming federal district court has previously determined that the phrase 'coal and other minerals' unambiguously encompasses oil and gas as a matter of Wyoming law. *Amoco Production Co.* v. *Guild Trust,* 461 F.Supp. 279, 283 (D.Wyo. 1978). We affirmed that holding in *Amoco Production Co.* v. *Guild Trust,* 636 F.2d 261 (10th Cir. 1980), *cert. denied,* 452 U.S. 967 (1981)." 696 F.2d at 93. (A. 10a)

The court did not analyze the merits of the underlying question and denied certification. Such a disposition ignores

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[19] The following question was proposed for certification:

"In deeds (contracted for in 1897 and 1899) otherwise conveying the fee interest in Wyoming lands, is the reservation of 'all coal and other minerals within or underlying said lands. . . .' effective as a matter of law unambiguously to reserve all oil, gas and associated liquid and gaseous hydrocarbons without regard to evidence as to the intent of the parties, drawn from, *inter alia,* the meaning of the words used at the time of deed execution, the interpretation placed on the deed language at the time of and after its execution, the relevant historical background or the parties' understanding of the statutes by which the land was granted to the grantor and pursuant to which the deed was given?" Brief of Defendants-Appellants in Support of their Motion for Certification to the Wyoming Supreme Court Pursuant to Wyo. Stat. § 1-13-106 at 6-7.

several points which suggest the extent of its rejection of core principles of our federal system. In the *Guild I* case relied upon by the Tenth Circuit (to which petitioners were not parties), the Court of Appeals had been asked to certify the very issue posed by the present case. As in this case, it declined without comment to certify the question and affirmed the lower court decision, although it explicitly acknowledged that Wyoming had not ruled on the issue. In fact, it acknowledged that other states had adopted a rule contrary to that adopted by the district court. 636 F.2d at 263-64. It explained its decision by reference to its view that the resident district court's opinion should be accorded "extraordinary force" when state law was unclear. *Id.* at 264.[20]

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[20] The Tenth Circuit's *Guild I* opinion did purport to survey the law as to the meaning of the phrase "minerals." It concluded that while Pennsylvania was of the view that "minerals" "does not include oil and gas" and Arkansas followed a somewhat similar rule, the majority rule and the rule "in the West" was that minerals included these substances. 636 F.2d at 263.

The mere fact of a recognized minority rule to the contrary itself suggests the seriousness of the undecided question, quite without regard to the views of the State of Wyoming discussed in text. Moreover, the suggestion of a common policy in the West is misleading. The court itself recognized that Oklahoma "follows the Pennsylvania rule." *Id.* at 263 n.2. And Utah, an adjoining state, had adopted a rule that views "minerals" as creating only a rebuttable presumption that oil and gas are included, rather than the absolute rule adopted by the Tenth Circuit for Wyoming. *See Western Development* v. *Nell*, 4 Utah 2d 112, 288 P.2d 452 (1955). *Cf. Radke* v. *Union Pacific R.R.*, 138 Colo. 189, 334 P.2d 1077 (1959) (where the Colorado Supreme Court considered the effect of an Union Pacific reservation of an "exclusive right to prospect for coal and other minerals" and held it ineffective on the ground that it was a mere license).

Discovery in the parallel Utah case suggests the strength of the evidence which would be available to petitioners if Wyoming adopted anything but the absolute rule adopted by the Tenth Circuit. That discovery has shown that when the Railroad meant to reserve "oil" the term was specifically included by hand in the early years and later in a preprinted form. And the word "oil" was, upon occasion, stricken from preprinted railroad forms—an

The court in *Guild I* did not even allude to the availability of certification. Nor did it deal with the expressed opinion of the State of Wyoming that the court's guess was, in fact, likely wrong. In the *Guild I* case the State of Wyoming sought leave to file a brief in support of the motion to abstain or certify. The brief of the State lodged with the court in support of that motion emphasized that the real property issue at stake would "affect title to the mineral estate of lands owned by the State of Wyoming and thousands of its citizens," (A. 19a) and that "[i]t would be difficult to conceive of an issue that has greater bearing or interest to the State of Wyoming than the ownership of real property within its borders." *Id.* It stressed as well that a federal "forecast" of the eventual Wyoming decision would have no precedential effect and would leave the matter unresolved. (A. 20a) It noted the potentially "disruptive" effect of the "exercise of federal jurisdiction" on "the State's efforts to establish a coherent, uniform policy and method of even handed, intelligent regulation of ownership of vital resources such as oil and gas." (A. 19a-20a) The significance of these concerns was emphasized by the view on the merits expressed by the State:

> "It is the opinion of the State that if given an opportunity to decide such questions, the Supreme Court of the State of Wyoming would likely differ from the decision of the District Court below in this case." (A. 23a)

The Tenth Circuit in *Guild I* denied leave even to file that brief and in this case did not refer to the views of the State of Wyoming.

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act hardly consistent with a view that reservations of "coal and other minerals" and "oil, coal and other minerals" were of identical meaning. It is material of this nature which the Tenth Circuit's ruling wholly excludes.

Nor did the Court of Appeals note in this case the consistent efforts of the Union Pacific and the other respondents to block state court adjudication of the meaning of the reservations. This effort has led respondents not only to oppose certification in this case, but to remove three cases commenced in the Wyoming state courts.[21] In addition, certification was sought and denied in the removed cases and the two *Guild* cases. These circumstances, taken together, make apparent the threat to federal-state relations from so clear a circumvention of the Wyoming courts and so disdainful a rejection of views of the State itself as to land within its borders.

Quite apart from principles of federalism, principles of judicial economy also supported certification here. One of the problems inherent in federal adjudication of unresolved issues of state law is that such decisions provide no definitive guidance for the future (*see* Sheran and Isaacman, *supra* n.16 at 58); this makes certification particularly ap-

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[21] *Thousand Peaks Ranches, Inc.* v. *Union Pacific Land Resources Corp.*, No. C-79-091K (D.Wyo.) (appeal pending); *Thousand Peaks Ranches, Inc.* v. *Union Pacific Corp.*, No. C-79-188K (D.Wyo.) (appeal pending); *Guild Trust* v. *Union Pacific Land Resources Corp.*, 682 F.2d 208 (10th Cir. 1982) (*"Guild II"*). The last of these cases, one involving essentially the same parties as those involved in the earlier *Guild I* case relied upon by the Tenth Circuit, may serve as a paradigm of the risks to federalism inherent in that court's treatment of Wyoming land law issues in this and other cases. That case was commenced in the state courts in Uinta County, Wyoming. It was removed to the federal courts by Union Pacific and Amoco. It was decided in substantial part in reliance upon the earlier *Guild I* ruling decided by the same federal district judge. On appeal the Tenth Circuit refused to certify the Wyoming law question, although it recognized that the question of Wyoming law had not been passed upon by the courts of that State and that "[r]eal property doctrines are matters for the determination of the state where the land is located." 682 F.2d at 212. The Court did not refer to the brief *amicus curiae* of Wyoming proffered in that case, as in the earlier one, urging that the Wyoming courts be permitted to make just that "determination."

propriate in cases when the same issue is likely to recur in other cases in the federal courts. Three other cases now in the federal courts involve the very issue of Wyoming law posed here.[22] Thousands of Wyoming citizens and landowners will also be affected by an ultimately dispositive decision. *See* Brief Amicus Curiae of the State of Wyoming at A. 19a.

This Court has taken pains to permit state courts to decide significant issues of state land law, even in the absence of so convenient a procedure as certification. In remitting a cause concerning oil rights to an Illinois state plenary action rather than a federal bankruptcy proceeding the Court stated:

> "Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State, which in such matters is supreme." *Thompson* v. *Magnolia Petroleum Co., supra,* 309 U.S. at 484 (footnote omitted).

See also Leiter Minerals, Inc. v. *United States,* 352 U.S. 220 (1957) (where this Court modified a judgment of the Court of Appeals to permit the parties to seek declaratory judgment in the Louisiana state courts with respect to aspects of a dispute over mineral rights); *Kaiser Steel Corp.* v. *W.S. Ranch Co.,* 391 U.S. 593 (1968) (*per curiam*) (authorizing abstention in a dispute over water rights).

Here the far less drastic certification procedure is available. The Wyoming Supreme Court is currently "the most

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[22] These cases are the two *Thousand Peaks* cases cited in n.21, *supra,* and *Anschutz Land and Livestock Co.* v. *Union Pacific R.R.,* No. C-77-0390(J) (D.Utah).

up-to-date state supreme court in the nation" (State of Wyoming, *1983-84 Biennium Request* at 3). Thus a speedy adjudication of any certified question could be expected.[23]

As Justice Frankfurter lamented, federal courts sometimes must embark upon "the ascertainment" and, as appears to have occurred here, "the formulation" of state law in matters of grave concern to the state. *See Sutton* v. *Leib, supra,* 342 U.S. at 413 (Frankfurter, J., concurring). But it is not always necessary to undertake so perilous a venture. This is a case in point. State procedures exist to obtain a definitive ruling as to the proper interpretation of Wyoming real property law. In failing to avail itself of these procedures, in failing even to explain its refusal to do so in the face of the expressed views of the State itself as to the importance of the matter and its likely disposition in the Wyoming Supreme Court, the Court of Appeals ignored basic values of our federal system. This Court should grant the petition in order to permit the Court of Appeals to certify the question or, in the alternative, to permit this Court itself to do so, as permitted by the Wyoming certification statute.

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[23] The Wyoming Supreme Court has also made clear that even were a certified matter viewed as an "interlocutory" question "not in connection with a final disposition of the case" this would pose no bar to its receiving and deciding the certified question from the federal courts. *Rhodes* v. *Bush,* No. 5640 (Wyo. 1982) (Raper, J., concurring). The receptiveness of that court to certification in general has been reflected most recently in *Wyoming State Dept. of Ed.* v. *Barber,* 649 P.2d 681, 691 (1982) (Rooney, J. concurring).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Opinion of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 80-1966

December 14, 1982

UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Plaintiffs-Appellees,

v.

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC., d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. C79-157K)

Before:

SETH, SEYMOUR, and COOK.*

SEYMOUR, Circuit Judge.

This diversity action involves title to oil and gas interests in lands situated in western Wyoming. Union Pacific Land

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*Honorable H. Dale Cook, Chief District Judge for the Northern District of Oklahoma, sitting by designation.

Resources Corporation (Union), Champlin Petroleum Company (Champlin), and Amoco Production Company (Amoco) brought this quiet title suit in the Wyoming District Court against Moench Investment Company (Moench) and Thousand Peaks Ranches, Inc. (Thousand Peaks), the holders of the surface estate to the lands in question. The district court granted summary judgment in favor of plaintiffs, and Moench and Thousand Peaks (hereinafter referred to collectively as Moench) appeal. Moench contends that summary judgment was inappropriate because facts crucial to the interpretation of documents determinative of the oil and gas ownership issue remain controverted. We disagree.

I.

Historical Background

The lands involved in this case, five sections or part-sections of land located in Uinta County, Wyoming, were originally granted to a corporate predecessor of the Union Pacific Railroad Company pursuant to the Union Pacific Act of 1862, ch. 120, 12 Stat. 489, *amended by* Act of July 2, 1864, ch. 216, 13 Stat. 356. Section 3 of the Act granted odd-numbered sections of public land to the Railroad for every mile of track laid "for the purpose of aiding in the construction" of a transcontinental railway.[1] The Union

[1] Section 3 provides:

"*And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles

Pacific Act of 1862, ch. 120, § 3, 12 Stat. 489, 492, *amended by* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358. The grant excluded "all mineral lands" from the conveyance. Union Pacific Act § 3. Section 4 of the Act provided that patents to the lands conveyed by section 3 would be issued to the Railroad upon completion of forty consecutive miles of railway. *Id.* § 4.

The lands here at issue were originally granted to "The Union Pacific Railroad Company" (The Union Pacific) by the Union Pacific Act. In the years immediately following the Act's passage and amendment, The Union Pacific was unable to raise adequate financing for construction of the railway. Therefore, in 1867 the company mortgaged its entire land grant including the lands in controversy. A second mortgage of the entire grant was executed in 1873. In 1880, The Union Pacific was consolidated with two other land-grant railroad corporations to form "The Union Pacific Railway Company" (the Railway), which succeeded to The Union Pacific's interests. *See United States* v. *Union Pacific Railway*, 148 U.S. 562, 566-67 (1893). In 1893, the Railway went into receivership. The mortgage was fore-

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on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed; *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

Union Pacific Act of 1862, ch. 120, § 3, 12 Stat. 489, 492, *amended by* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358.

closed in 1898, Final Decree of Foreclosure, *Union Trust Co.* v. *The Union Pacific Railway* (No. 252, D. Utah 1898) (cited in Rec., vol. I, at 324), and the land-grant lands and interests therein still owned by the Railway were sold to the "Union Pacific Railroad Company" (the Railroad) in 1899, Rec., vol. VII, Ex. 1-C (Special Master's deed). The Railroad obtained patents to these lands in 1901. The Railroad later sold the real estate to the Rigby Ranch Company retaining "all coal and other minerals" for itself, its successors, and its assigns. Moench acquired the Rigby Ranch Company interests between 1936 and 1939, and Union obtained the Railroad interests in 1971. In 1977, Union conveyed its petroleum rights in the lands to Champlin, which subsequently leased the same to Amoco.

II.

Procedural History

Union, Champlin, and Amoco (hereinafter referred to collectively as Union) brought an action to quiet title to the petroleum rights in these Wyoming lands in June 1979. The lawsuit was apparently a reaction to litigation previously commenced by Moench and others contesting Union's title to oil and gas under identical mineral reservations in deeds to other land grant property in Utah and Wyoming.

Moench responded to the quiet title action by: (1) denying that Union owned any minerals in the Wyoming real estate; (2) contending that the Union Pacific Act required the original grantee and its successors to sell or forfeit all interests in the land grant acreage; and (3) claiming that the Railroad's retention of "all coal and other minerals" was ambiguous and should be interpreted to exclude oil and gas.

The district court entered summary judgment for Union in August 1980. *Union Pacific Land Resources Corp.* v. *Moench Investment Co.*, 495 F. Supp. 876 (D. Wyo. 1980). The court recited the previously outlined chains of title, determined that the mineral reservation included oil and gas rights as a matter of state law, and rejected Moench's Union Pacific Act claims. *Id.* at 877-78.

Moench now contests on two independent bases the propriety of entering summary judgment. It primarily asserts that facts prerequisite to a correct construction of Pacific Railroad Act land grant conditions remain in dispute. Moench suggests this alleged factual controversy precludes any summary determination as to the extent of Union's oil and gas ownership in the Wyoming properties. Moench additionally charges that the Railroad's deed reservation of "all coal and other minerals" is ambiguous and argues that parol evidence establishes that the clause excludes petroleum products.

III.

Analysis

A. Pacific Railroad Act Issue

Moench's first argument focuses on the Act's "settlement and preemption" proviso. Congress granted the section 3 lands to The Union Pacific to enable it to finance its construction costs by land sales. However, Congress did not wish the lands to be entirely foreclosed to settlers in the country's nineteenth century westward expansion. Thus, Congress provided that

> "[A]ll such lands, so granted by this section, which shall not be sold or disposed of by said company within three

> years after the entire [transcontinental railway] shall have been completed, shall be subject to settlement and preemption, like other lands. . . ."

Union Pacific Act § 3.

Moench maintains that factual disputes exist concerning the meaning of this condition and the compliance or non-compliance with its requirements, which render summary judgment improper. Moench claims that the facts surrounding the insertion of the proviso into the Union Pacific Act suggest a governmental intention to prevent The Union Pacific (and thus its successors in interest) from obtaining any surface or mineral interest in the granted lands beyond that immediately necessary for the construction of the railway. Moench additionally argues that the Wyoming property was never "sold or disposed of" as required by the settlement and preemption proviso, and that public policy therefore demands that the Railroad's successor, Union, now divest itself of all interest in the real estate.

Moench's theory essentially must be that the terms of section 3 precluded the Railroad from retaining an interest in the mineral estate while selling the surface estate to Moench's predecessor in interest. The section does state that "all mineral lands" are excepted from the Act's land grants. *See United States* v. *Union Pacific Railroad*, 353 U.S. 112, 114-17 (1957). However, the Supreme Court has held repeatedly that this exception refers to the determination at time of patenting of the lands' mineral or non-mineral character. *See, e.g., id.* at 116; *Burke* v. *Southern Pacific Railroad*, 234 U.S. 669, 683-85, 698-705 (1914); *Shaw* v. *Kellogg*, 170 U.S. 312, 339 (1898); *Davis* v. *Wiebbold*, 139 U.S. 507, 519 (1891). The issuance of a patent after an administrative determination that the lands were not

mineral in character was held to constitute a final administrative decision that is conclusive on the issue against collateral attack. *Burke*, 234 U.S. at 691-92, 710; *see also Davis* v. *Wiebbold*, 139 U.S. at 526-27, 529-30 (Land Department patents conclusive when assailed collaterally); *Deffeback* v. *Hawkes*, 115 U.S. 392, 404-05 (1885) (lands for which a patent has been issued under a grant excepting mineral lands are proof against a later discovery of minerals).[3] The lands at issue were patented to the Railroad in 1901. The mineral lands exclusion therefore does not restrain grantees' ability to reserve mineral interests in sales of section 3 lands.

Neither do we find Moench's "settlement and preemption" clause argument persuasive. The language of the clause in no way suggests that the grantee received only a limited fee barren of rights to whatever minerals might later be discovered. Nor does the language suggest that the grantee was required to convey its entire fee to a purchaser. Moench points to no legislative history that supports its interpretation of the clause. At most the clause requires the grantee to stand in the government's shoes with respect to settlers seeking preemptive rights to lands neither sold nor disposed of within three years of completion of the railway. In such a situation, a settler seeking land under section 3

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[3] The patents to the lands at issue here contain the phrase "the United States . . . Do Give and Grant unto the said 'Union Pacific Railroad Company' and to its assigns the tracts of land listed [in the patent]: Yet excluding and excepting from the transfer by these presents 'All Mineral Lands' should any such be found to exist in the tracts." Rec., vol. VII, Exhibits I-A, -B. In *Burke* v. *Southern Pac. R.R.*, 234 U.S. 669 (1914), the Supreme Court held that this clause, contained in all patents issued from 1866 to 1904 under railroad land grants containing mineral lands exclusions, was invalid. *Id.* at 693-95, 705, 710-11.

might well be entitled to the entire fee. However, we need not address this question, for in this case the lands at issue *were* "sold or disposed of . . . within three years" of the railway's completion.

In 1879, the Supreme Court examined the effect of the land-grant mortgages relative to section 3's "sale or disposal" clause. In *Platt* v. *Union Pacific Railroad*, 99 U.S. 48 (1879), would-be preemptors challenged the mortgage transactions as not being sales or disposals as required by section 3. The Court dismissed the claim that this financing maneuver was violative of congressional intent that the company not acquire a monopolistic holding of the public lands, *id.* at 64-65, stating that "we have been led unhesitatingly to the conclusion that the deed of trust or mortgage executed . . . in 1867 was a disposition of the lands granted by the 3d section of the Act of 1862, within the meaning of that Act," *id.* at 64.[3]

In *Platt*, the Court specifically declined to consider "whether the lands covered by the mortgage will not be open for preemption, if they shall remain unsold after the mortgage shall be extinguished." *Id.* We too need not consider the question, because the lands were in fact sold upon foreclosure of the mortgages. The lands were not then

[3] Moench argues that we should discount *Platt's* holding because it was a "collusive" lawsuit, brought by one of the Union Pacific's own attorneys, William H. Platt, and completely funded by the railroad. Brief of Appellant, at 10. Although this contention is intriguing, we note that the case was argued before the Court by the Attorney General of the United States as intervenor in opposition to The Union Pacific, *see Platt* v. *The Union Pac. R.R.*, 99 U.S. 48, 48 (1879) (reporter's syllabus). Additionally, the Court fully considered and discussed the "sale or disposal" issue. Because *Platt* has never been overturned, it remains determinative on this point.

and are not now subject to the settlement and preemption clause.[4]

The Union Pacific received an unqualified fee interest in the lands involved in this case and subsequently "sold or disposed of" them as required by the statute. We hold that the Railroad's sale of the surface estate to the Rigby Ranch Company, reserving "coal and other minerals" to the Railroad, did not violate the Union Pacific Act.[5]

B. Deed Reservation Claims

Moench erroneously argues that summary judgment is improper because of factual disputes over the scope of the

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[4] This quiet title suit resolves only the relative rights of the parties involved. From the record before us, it appears evident that if any doubt remains about the nature of the interest granted to The Union Pacific, the only party who could raise that question would be the original grantor, the United States. *Burke* v. *Southern Pac. R.R.*, 234 U.S. 669 (1914), a case brought by a person claiming mineral rights in lands patented to the railroad, held that the government's issuance of a patent vested title to petroleum deposits located in the lands conveyed. *Id.* at 710-11. The railroad's title was subject to the government's right to attack the patent by a direct suit for annulment if the land was known to be mineral when the patent was issued. *Id.* The government does not appear in this case.

Likewise, the only other cloud on appellees' interests here, the mineral lands exception contained in the original federal patents, *see* note 2 *supra*, would lie in favor of the government. The government does not appear to contest the Supreme Court's holding in *Burke*, 234 U.S. at 710, that such exception is void and of no effect.

[5] We also reject Moench's argument that a factual dispute involving the meaning of or adherence to the "sale or disposal" condition precludes summary judgment in this case. Questions of statutory construction and legislative history traditionally present legal questions properly resolved by summary judgment. *Standard Oil* v. *Department of Energy*, 596 F.2d 1029, 1066 (Temp. Em. Ct. of App. 1978); *Mobil Oil Corp.* v. *Federal Energy Admin.*, 566 F.2d 87, 92 (Temp. Em. Ct. of App. 1977).

Railroad's reservation of "coal and other minerals" in its conveyances to Moench's predecessor. Wyoming substantive law governs this diversity case. Although no Wyoming state court has passed upon the issue, a Wyoming federal district court has previously determined that the phrase "coal and other minerals" unambiguously encompasses oil and gas as a matter of Wyoming law. *Amoco Production Co.* v. *Guild Trust*, 461 F. Supp. 279, 283 (D. Wyo. 1978). We affirmed that holding in *Amoco Production Co.* v. *Guild Trust*, 636 F.2d 261 (10th Cir. 1980), *cert. denied*, 452 U.S. 967 (1981). Because the phrase is unambiguous, there is no need to resort to the supplementary materials that Moench contends are necessary to determine the plain meaning of the reservation. *See Shepard* v. *Top Hat Land & Cattle Co.*, 560 P.2d 730, 732 (Wyo. 1977).

Moench also makes numerous allegations of deceptive and inconsistent practices on the part of the Railroad in its sales of section 3 lands. However, Moench does not allege that its predecessor, the Rigby Ranch, was in fact defrauded or misled in any way in its purchase of the lands at issue. Consequently, although Moench's contentions make interesting reading, they provide no basis for remanding for further consideration in examining the transaction at issue.

We have reviewed Moench's remaining arguments and find them unpersuasive.

AFFIRMED.

Order of the United States District Court for the District of Wyoming Sustaining Motion for Summary Judgment and Summary Judgment

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UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Plaintiffs,

v.

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC., d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Defendants.

No. C79-157K

United States District Court,
D. Wyoming

Aug. 15, 1980

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT AND SUMMARY JUDGMENT

KERR, District Judge.

The above-entitled matter coming on regularly for hearing before the Court upon plaintiffs' Motion for Summary Judgment, and the Court having heard the arguments of counsel in support of said Motion and in opposition thereto, and the Court having taken said matter under advisement and having fully and carefully considered the pleadings, exhibits, affidavits and memorandum briefs filed on behalf

of the parties, and all matters relevant thereto, and being fully advised in the premises; FINDS

1. Plaintiffs and defendants are citizens of different states, and the amount in controversy exceeds $10,000 exclusive of interest and costs.

2. The Court has jurisdiction of this controversy pursuant to 28 U.S.C. 1332(a).

3. This is an action to quiet title to minerals in certain sections and part-sections of land in Uinta County, Wyoming. The legal description of the lands in question is as follows:

Township 12 North, Range 120 West of the 6th P.M.
Section 19: All
Township 12 North, Range 121 West of the 6th P.M.
Section 1: All
Section 3: Lots 1, 2, 3
Section 11: All but the SW-¼-SW¼
Section 13: All

4. The lands, including all minerals and mineral rights therein, were granted in fee to the Union Pacific Railroad Company, a federally-chartered corporation, its successors and assigns, by and under the Pacific Railway Act of 1862, 12 Stat. 489, as amended in 13 Stat. 356 (1864), (the Union Pacific Act).

5. These lands were conveyed by the United States of America to Union Pacific Railroad Company, a Utah corporation, as a successor in interest to the original grantee, by Patents No. 63 and 65, dated May 28, 1901.

6. By Warranty Deeds dated March 12, 1908 and December 7, 1909, Union Pacific Railroad Company conveyed

the lands to Rigby Ranch Company, subject to a reservation to the Union Pacific Railroad Company, its successors and assigns, of "all coal and other minerals within or underlying said lands." The language of the mineral reservations is identical to the language of the reservation construed by this Court in *Amoco Production Company* v. *Guild Trust*, 461 F.Supp. 279 (Wyo.1978).

7. Plaintiffs are collectively the successors to the mineral estate reserved by Union Pacific Railroad Company in its conveyances to Rigby Ranch Company.

8. Defendants are successors in interest to Rigby Ranch Company and are owners of record of the lands, subject to the aforesaid mineral reservations in favor of Union Pacific Railroad Company.

9. By Quitclaim Deed dated April 1, 1971, the reserved mineral estates were conveyed by Union Pacific Railroad Company to Union Pacific Land Resources Corporation. This corporation then executed a Mineral Deed of the oil and gas rights, dated December 10, 1976, to Champlin Petroleum Company. Champlin then granted an Oil and Gas Lease to Amoco Production Company, dated January 12, 1977, of oil and gas rights in certain of the subject lands.

10. There is no genuine issue as to any material fact and the case is ripe for Summary Judgment.

11. The reservations of "all coal and other minerals" in the deeds to the lands are lawful and valid reservations of minerals according to their terms, and are in no way contrary to or inconsistent with the Union Pacific Act. *Burke* v. *Southern Pacific Railroad Co.*, 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527 (1914); *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979).

12. The reservations of "all coal and other minerals" in the deeds to the lands unambiguously sever the mineral estate and reserve to Union Pacific Railroad Company, its successors and assigns, all right, title and interest in the entire mineral estate, including all oil, gas and associated liquid and gaseous hydrocarbons in and under the subject lands and attendant rights of surface access. *Amoco Production Company* v. *Guild Trust*, supra.

13. Plaintiffs are therefore entitled to a judgment quieting their title to the entire mineral estate, including all oil, gas and associated liquid and gaseous hydrocarbons in and underlying the subject lands, and plaintiffs are entitled to a permanent injunction enjoining defendants, their agents, servants, employees and any persons acting in concert or participation with them who receive actual notice of this Court's order from interfering or attempting to interfere with the exercise by plaintiffs of the mineral rights confirmed by the judgment.

Now, Therefore, It Is Ordered that the Motion for Summary Judgment be and the same is hereby granted in favor of the plaintiffs and against the defendants, quieting title to the aforesaid described premises; it is

Further Ordered that each party pay its own costs.

Motion of the State of Wyoming for Leave to File Brief Amicus Curiae in *Amoco Production Co.* v. *Guild Trust*

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 79-1236

AMOCO PRODUCTION COMPANY, a corporation; CHAMPLIN PETROLEUM COMPANY, a corporation; and UNION PACIFIC LAND RESOURCES CORPORATION, a corporation,

Appellees,

—vs—

GUILD TRUST: MELBA L. GUILD: DELMAR D. DEAN and MARY MELBA GUILD DEAN, husband and wife; EARL GUILD and BARBARA JO GUILD, husband and wife; FRED CHRISTIANSEN and EVA LOIS CHRISTIANSEN, husband and wife,

Appellants.

No. 79-1568

GUILD TRUST, et al.,

Appellants,

—vs—

UNION PACIFIC LAND RESOURCES CORPORATION, et al.,

Appellees.

MOTION FOR LEAVE TO FILE AMICUS BRIEF

In accordance with Rule 29, Federal Rules of Appellate Procedure, the Applicant State of Wyoming hereby moves

Motion of the State of Wyoming for Leave to File Brief Amicus Curiae in Guild I

for leave to file an Amicus Curiae brief respectfully requesting that the Tenth Circuit Court of Appeals abstain from determination of the above-entitled action pending resolution of the legal issues involved by a State of Wyoming District Court or the Supreme Court of the State of Wyoming. In the alternative, the Applicant State of Wyoming respectfully requests that the Court issue a stay of proceedings Order and certify the questions of state law to the Supreme Court of the State of Wyoming, in accordance with Rule 11, Wyoming Rules of Appellate Procedure. A copy of that Rule is attached to this motion, marked Exhibit A.[*]

The State of Wyoming is owner of lands in Wyoming containing similar mineral reservations as are involved in the above-entitled case and is presently considering the advisability of initiating litigation concerning the ownership of liquid hydrocarbons and other minerals contained in the mineral estates of such property. The State of Wyoming believes that the legal issues involved are questions of substantive state law, as defined by *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and as yet undetermined by the Supreme Court of Wyoming. As the resolution of such issues would significantly and directly affect State property and the rights and liabilities of numerous citizens of the State of Wyoming, the Applicant respectfully submits that the issues are ones better determined by the courts of the State of Wyoming and, therefore, requests the opportunity to present argument in this Court on the matter.

[* Exhibit A omitted in printing. See Wyoming Rules of Appellate Procedure Rule 11, set forth in the Statutory Appendix at p. 6a.]

Motion of the State of Wyoming for Leave to File Brief Amicus Curiae in Guild I

Therefore, the Applicant State of Wyoming respectfully moves this Court for leave to file an Amicus Curiae Brief presenting argument to the Court in the above-entitled matter.

Respectfully submitted,

/s/ Peter J. Mulvaney
Deputy Attorney General for The Attorney General of the State of Wyoming

/s/ Richard Scott Rideout
Assistant Attorney General

/s/ Mary Bell Guthrie
Assistant Attorney General

Amicus Brief of the State of Wyoming in Support of Appellant's Motion for Abstention or, in the Alternative, Certification in *Amoco Production Co.* v. *Guild Trust*

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 79-1236

AMOCO PRODUCTION COMPANY, a corporation; CHAMPLIN PETROLEUM COMPANY, a corporation; and UNION PACIFIC LAND RESOURCES CORPORATION, a corporation,

Appellees,

—VS—

GUILD TRUST: MELBA L. GUILD: DELMAR D. DEAN and MARY MELBA GUILD DEAN, husband and wife; EARL GUILD and BARBARA JO GUILD, husband and wife; FRED CHRISTIANSEN and EVA LOIS CHRISTIANSEN, husband and wife,

Appellants.

No. 79-1568

GUILD TRUST, et al.,

Appellants,

—VS—

UNION PACIFIC LAND RESOURCES CORPORATION, et al.,

Appellees.

AMICUS BRIEF OF THE STATE OF WYOMING IN SUPPORT OF APPELLANT'S MOTION FOR ABSTENTION

Amicus Brief of the State of Wyoming in Guild I

I

Motion for Stay of Proceedings and Abstention

It is the position of the State of Wyoming that the Federal Tenth Circuit Court of Appeals should stay and abstain from decision in the above-entitled appeal pending resolution and determination of existing State litigation involving identical issues. In this regard, the State of Wyoming adopts the Brief of Appellants, entitled "Memorandum in Support of Appellant's Motion to Stay and Motion for Abstention and Alternative Motion for Certification" and the arguments and legal authority offered therein. The purpose of the State's brief is not to repeat those arguments, but to attempt to impress upon the Court of Appeals the vital character of the litigation and issues and how those issues affect the State of Wyoming and its citizens. It is the position of the State of Wyoming that analysis of the circumstances and factors presented in this case justify abstention.

A.

This Case Bears on Policy Problems of Substantial Public Import.

Resolution of the issues presented in this case will directly affect title to the mineral estate of lands owned by the State of Wyoming and thousands of its citizens. It would be difficult to conceive of an issue that has greater bearing or interest to the State of Wyoming than the ownership of real property within its borders. Clearly, the issue presents a substantial question of public policy and concern and the exercise of federal jurisdiction could be disruptive of the State's efforts to establish a coherent,

uniform policy and method of even handed, intelligent regulation of ownership of vital resources such as oil and gas. As noted in Appellant's memorandum, conservation and revenue production are major concerns to the State. The question is basic: ownership of Wyoming real property. The State respectfully submits that resolution of so fundamental a question should only be made by a Wyoming Court after full opportunity for development of the facts and law.

B.

The Issues Will Eventually Have To Be Resolved by the Wyoming Judiciary.

Under the *Erie Doctrine, Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), in diversity cases, questions of substantive law are to be determined by the law of the State where the federal court is located. In the absence of such a determination, the federal courts may, of course, decide the issue, based on what they *believe* to be the State law. Such a forecast can not, however, bind the State judiciary and the decision is not of controlling precedential value. Such a determination will only affect the immediate parties to the action and will not establish a general proposition of law of statewide application as would a decision of the highest court of a State. In the case before the Court, no general, uniform rule of law will result from this litigation if decided by the United States Tenth Circuit Court of Appeals and the State of Wyoming and its citizens will be denied the benefit of stability, uniformity and certainty in an area of law that directly, substantially and vitally affects their lives and fortunes. Unless and until the issues are resolved by the Wyoming Judiciary, such uncertainty will remain to plague real

property transactions in the State. The State respectfully submits that this court should not aid or further such a result.

C.

The Issues Are Novel and Unique in Wyoming.

The State represents to this Court that it is unaware of any Wyoming Supreme Court Decision that is determinative of the issues presented before this Court. Such a case, however, is now pending before a district court in Wyoming on an action for declaratory judgment. Resolution of that case will settle the issues before this Court. Further discussion of this point is set forth in Section *D.*, below.

D.

Resolution of the Issues by the Wyoming Court Is Imminent.

As noted in the brief of Appellant, Appellants' Memorandum In Support of Motion to Stay and for Abstention, p.14, one of the factors noted by the United States Supreme Court in the *Kaiser Steel Co.* v. *W.S. Ranch Co.,* 391 U.S. 593 (1968), case as bearing on the decision whether a federal court should abstain from decision of an issue in the presence of litigation in a state court concerning the same or similar issues. In *Kaiser Steel,* the Supreme Court found the fact that the litigation was for a declaratory judgment was sufficient to assure reasonably speedy state court resolution of the questions. The State of Wyoming represents to this court that such is the situation here.

On September 24, 1979, the State of Wyoming, as plaintiff, filed a Declaratory Judgment action to quiet title to a

mineral estate in land owned by the State as a subsequent grantee. The Union Pacific Railway Company was the grantor under the original deed. That original deed, from the Union Pacific Railway Company to the State's predecessor in title, A.C. Beckwith, contained the following reservation:

> "RESERVING, HOWEVER, to the said Union Pacific Railway Company the exclusive right to prospect for caol (sic) and other minerals within and underlying said lands and space necessary for the conduct of said business thereon, without change or liability for damage therefore."

This action was filed in the district court, Unita County, Wyoming, Third Judicial District, State of Wyoming, Civil No. 69-1372. A copy of the complaint is attached to this brief, marked "Exhibit A." [*] The action was brought under the Wyoming Declaratory Judgments Act, § 1-37-101, et seq., W.S. 1977, to quiet title to the mineral estate. It appears clear in Wyoming that such a procedure is proper. *Ohio Oil Co.* v. *The Wyoming Agency, Inc.*, 63 Wyo. 187, 179 P.2d 773 (1947). In addition, this act, and Rule 57, Wyoming Rules of Civil Procedure (identical for this purpose with Rule 57, Federal Rules of Civil Procedure), allows a "speedy hearing of an action for a declaratory judgment . . . ," and advancement on the court calendar. C.f., Wright and Miller, Federal Practice and Procedure, Civil: § 2768; Moore's Federal Practise, Vol. 6A, ¶ 57.29. It is the avowed intention of the State of Wyoming to pursue this matter to judgment with all deliberate speed, thus satisfying another factor that should induce this court to abstain from decision in this case.

[* Exhibits omitted in printing.]

E.

There Is Strong Likelihood That the Wyoming Court Will Rule Differently on the Dispositive Issues in This Case.

The State adopts the Appellant's arguments as set out in his memorandum, at p. 14, and commends the Court to consider the thoughtful analysis offered there. It is the opinion of the State that if given an opportunity to decide such questions, the Supreme Court of the State of Wyoming would likely differ from the decision of the District Court below in this case.

CONCLUSION

As the United States Supreme Court noted in *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 324 (1942), it is not unusual for the Attorney General of a State to become involved with litigation that cannot be categorized as a "mere isolated dispute between private parties." When issues are of vital, general concern to the public, it is only natural and appropriate that the State's highest law official should become involved to protect those interests. The Attorney General of the State of Wyoming believes the case before the court presents such a situation and respectfully requests that the United States Tenth Circuit Court of Appeals abstain from decision until the pending litigation in the State of Wyoming is resolved. A review of that State court action will reveal that the parties defendant are virtually identical to the Appellees here; the legal issues, factual allegations are virtually identical; the relief prayed for is similar; and,

the same central issue is presented by both cases. In this situation, abstention is proper.

October 11, 1979

Respectfully submitted,

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Upland Industries Corporation Summary of Land Grant Lands by Type of Mineral Reservations as of December 31, 1977 and Interpretive Code

Mineral Type	Colorado Acres	Kansas Acres	Nebraska Acres	Utah Acres	Wyoming Acres	Total Acres
101	183,975.98	1,200.01	.00	600.00	.00	185,775.99
102	.00	80.00	.00	.00	.00	80.00
103	80.00	.00	.00	.00	.00	80.00
104	320.00	.00	.00	.00	.00	320.00
105	.00	.00	.00	.00	.00	.00
106	38,023.79	.00	.00	.00	.00	38,023.79
107	320.00	.00	.00	.00	.00	320.00
108	.00	320.00	.00	.00	.00	320.00
109	.00	.00	.00	.00	13.92	13.92
201	.00	.00	.00	60,067.01	49,164.27	109,231.28
202	.00	.00	.00	369.20	.00	369.20
203	122.36	.00	.00	120.00	29,397.93	29,640.29
204	.00	.00	.00	.00	20,469.16	20,469.16
205	400.00	.00	.00	.00	14,592.63	14,992.63
206	.00	.00	.00	920.00	52,615.23	53,535.23
207	.00	.00	.00	.00	1,797.57	1,797.57
208	.00	.00	.00	.00	640.00	640.00
209	3,124.02	.00	.00	.00	.00	3,124.02
210	.00	.00	.00	.00	205.00	205.00

Mineral Type	Colorado Acres	Kansas Acres	Nebraska Acres	Utah Acres	Wyoming Acres	Total Acres
211	400.00	.00	.00	.00	640.00	1,040.00
301	42,408.23	.00	.00	.00	640.00	43,048.23
302	.00	.00	.00	.00	.00	.00
303	.00	.00	.00	.00	220.00	220.00
401	636,856.50	1,119.77	94.61	416,484.97	757,051.71	1,811,607.56
402	.00	.00	.00	00	45,307.00	45,307.00
403	.00	.00	.00	.00	26,408.35	26,408.35
404	1,280.00	.00	.00	.00	.00	1,280.00
405	478.89	.00	.00	.00	80.24	559.13
406	640.00	.00	.00	5,386.56	31,808.78	37,835.34
407	.00	.00	.00	440.00	.00	440.00
408	.00	.00	.00	1,600.26	.00	1,600.26
409	.00	.00	.00	.00	77,505.48	77,505.48
410	.00	.00	.00	8,261.14	.00	8,261.14
411	.00	.00	.00	1,109.90	.00	1,109.90
412	.00	.00	.00	18,238.79	.00	18,238.79
413	.00	.00	.00	3,089.89	.00	3,089.89
414	.00	.00	.00	.00	178,665.03	178,665.03
415	190.00	.00	.00	.00	.00	190.00
501	1,844,391.09	2,327.60	18,760.78	141,930.26	2,068,487.33	4,075,897.06
502	.00	.00	.00	.00	33,899.42	33,899.42
503	.00	.00	.00	.00	13,080.27	13,080.27

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Mineral Type	Colorado Acres	Kansas Acres	Nebraska Acres	Utah Acres	Wyoming Acres	Total Acres
504	631.08	.00	.00	2,482.56	5,037.43	8,151.07
505	.00	.00	.00	438.50	.00	438.50
506	.00	.00	.00	297.86	.00	297.86
507	3,041.93	.00	.00	.00	.00	3,041.93
508	.00	.00	.00	.00	1,859.67	1,859.67
509	40.00	.00	.00	.00	640.00	680.00
510	.00	.00	.00	.00	25,668.42	25,668.42
511	.00	.00	.00	.00	480.00	480.00
512	649.28	203.70	637.98	.00	.00	1,490.96
513	.00	173.00	.00	.00	.00	173.00
514	177.14	.00	.00	.00	.00	177.14
515	.00	.00	.00	.00	8,031.79	8,031.79
516	320.00	.00	.00	.00	.00	320.00
517	.00	.00	.00	.00	.00	.00
601	59.86	4.28	78.50	88.90	17,970.04	18,201.58
602	460.46	22.24	231.65	8.88	7,803.02	8,526.25
603	.00	.00	.00	.00	.00	.00
604	.00	.00	.00	.00	98.99	98.99
605	1,560.51	.00	.00	.00	3,858.45	5,418.96
606	640.00	.00	.00	.00	.00	640.00
607	.00	.00	.00	.00	.00	.00
608	.00	.00	.00	.00	.00	.00
609	.00	.00	.00	.00	.00	.00
TOTAL	2,760,591.12	5,450.60	19,803.52	661,934.68	3,474,137.13	6,921,917.05

Summary of Types of Reservations

I—Union Pacific Railway—Coal or Stone

CODE

101 "Reserving to said Company and its assigns all coal that may be underneath the surface of the land herein described."

102 "Reserving to the first party any coal that may be underneath the surface of the land herein described."

103 "Reserving to said second party and assigns any coal that may be underneath surface of said land."

104 "It being clearly understood by the third party hereto that this deed shall not apply to any coal that may be underneath the surface of the land herein described, but coal shall be the exclusive property of the Railway Company."

105 "This deed shall not apply to any coal that may be underneath the surface of the land herein described, but the coal shall be the property of the Railway Company."

106 "Reserving to said Company and its assigns all coal that may be underneath the surface of the land herein described, and exclusive right to prospect and mine for same."

107 "Reserving to said Company and its assigns all coal and stone that may be underneath the surface of the land herein described."

108 "It is expressly understood and agreed by the second parties hereto and it is a part of the consideration for which this land is now sold, that all the stone

Summary of Types of Reservations

CODE

upon the land herein described and all the ground that may be required in the work of quarring and transporting the stone from said land is reserved by the party of the first part for its own use and benefit."

109 "The Union Pacific Railway Company's reservation of the right to mine coal under the surface."

II—Union Pacific Railway—Coal and Other Minerals

201 "Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said lands."

202 "It is also agreed and understood that the party of the first part shall have the right to prospect for coal and other minerals within and underlying said lands."

203 "Reserving to said Union Pacific Railway Company the right to prospect for coal and other minerals within and underlying said lands."

204 "Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said lands." Not redeemed from tax sale.

205 "The Union Pacific Railway Company reservation of undivided one-half interest—reserving however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said land."

Summary of Types of Reservations

CODE

206 "Reserving, however, to the said Union Pacific Railway Company its successors, grantees or assigns, the exclusive right to prospect for coal and other minerals within and underlying said lands."

207 "Reserving, however, to the said Union Pacific Railway Company its successors, grantees or assigns, the exclusive right to prospect for coal and other minerals within and underlying said lands." Not redeemed from tax sale.

208 "Undivided ½ interest to the coal rights only."

209 "Undivided ½ interest in the Union Pacific Railway Companies reservation of 'It is also agreed and understood that the party of the first part shall have the right to prospect for coal and other minerals within and underlying said lands."

210 "Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals, excluding sand and gravel, within and underlying said lands." Not redeemed for tax sale.

211 "Undivided ½ interest in reserving, however, to the said Union Pacific Railway Company and its successors, grantees or assigns, the exclusive right to prospect for coal and other minerals."

III—Union Pacific Railroad—Coal

301 "Coal only."

302 "Reserving all coal underneath surface with exclusive right to mine and prospect for same."

303 "Coal and Iron."

Summary of Types of Reservations

IV—Union Pacific Railroad—Coal and Other Minerals

CODE

401 "Coal and Other Minerals."

402 "Undivided ½ interest in coal and other minerals."

403 "Coal and other Minerals not redeemed from tax sale."

404 "Coal and other Minerals except lime stone rock."

405 "All Minerals except coal."
(All other Minerals—except coal).

406 "Coal and other Minerals and Timber."

407 "Coal and other Minerals and water needed for Railroad purposes."

408 "Coal and other Minerals and stone."

409 "Coal and other Minerals and fossils."

410 "Coal and other Minerals, building stone and Potter's clay."

411 "Coal, stone, slate and other minerals."

412 "Also, excepting and reserving to said Union Pacific Railroad Company its successors and assigns the exclusive right to quarry stone and prospect for coal and other minerals, within or underlying said lands."

413 "Natural gas, coal and other minerals."

414 "Reservation of ½ interest in coal and ¼ interest in other minerals."

415 "Coal and other minerals excluding those on the surface to a given point below."

Summary of Types of Reservations

CODE

V—Union Pacific Railroad—Oil, Coal and Other Minerals

501 "Oil, Coal and Other Minerals."

502 "Undivided ½ interest in oil, coal and other Minerals."

503 "Oil, Coal and Other Minerals. Not redeemed from tax sale."

504 "Oil, Coal and Other Minerals and Timber."

505 "Oil, gas, coal and Other Minerals."

506 "Coal, salt, oil and Other Minerals."

507 "Oil, coal, Other Minerals, Water and Water Rights."

508 "Oil, coal, and Other Minerals and Gravel."

509 "Oil and Other Minerals except Coal."

510 "Oil, coal and Other Minerals and Fossils."

511 "Oil, coal, and Other Minerals not including Sherman Gravel."

512 "Oil, coal, and Other Minerals except Sand and Gravel."

513 "Oil, coal and Other Minerals except Water, Sand, Gravel, and Limestone Rock."

514 "Oil, coal and Other Minerals excluding those on the surface to a given point below."

515 "Gas, oil, and Other Minerals."

516 "Oil, Coal and Other Minerals excluding Limestone Rock."

517 "Coal, Oil and Other Minerals without Right of Entry."

Summary of Types of Reservations

VI—Union Pacific Railroad— All Minerals and Mineral Rights

CODE

601 "All Minerals and all Mineral Rights."

602 "All Minerals and All Mineral Rights without the right of entry."

603 "All Minerals and All Mineral Rights and Timber."

604 "Reserve all Minerals and Mineral Rights excluding those on the surface to a given point below."

605 "Undivided ½ interest All Minerals and Mineral Rights."

606 "Undivided ½ interest of an undivided ½ interest All Minerals and Mineral Rights."

The Pacific Railroad Act of July 1, 1862, ch. 120, §§ 3 and 15, 12 Stat. 489, as amended, Act of July 2, 1864, ch. 216, 13 Stat. 356.

Section 3 of the Pacific Railroad Act of 1862 provided:

> SEC. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Section 3 was amended by section 4 of Act of July 2, 1864, ch. 216, 13 Stat. 356. The amending section provided:

> SEC. 4. *And be it further enacted,* That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by

inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and by inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any preemption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist, to be ascertained under such rules as have been or may be established by the commissioner of the general land-office, in conformity with the provisions of the preëmption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said commissioner may establish by general regulation: *Provided, also*, That the phrase "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one

of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "an act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land-office.

Section 15 of the Pacific Railroad Act of 1862 provided:

SEC. 15. *And be it further enacted,* That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto.

Section 15 was not amended by the 1864 Act.

Statutory Appendix

Wyoming Federal Court State Law Certificate Procedure Act

(Wyo. Stat. §§ 1-13-104 *et seq.* (1977))

§ 1-13-104. *Questions from federal courts; generally.*

W.S. 1-13-104 through 1-13-107 is cited as the "Federal Court State Law Certificate Procedure Act." (Laws 1975, ch. 78, § 1; 1977, ch. 188, § 1.)

§ 1-13-105. *Same; definitions.*

(a) As used in this act:

(i) "Certificate procedure" means the procedure authorized herein by which a federal court in disposing of a cause pending before it submits a question of state law to the supreme court for determination;

(ii) "Federal court" means any court of the United States of America including the supreme court of the United States, courts of appeal, district courts and any other court created by act of congress;

(iii) "Supreme court" means the supreme court of Wyoming. (Laws 1975, ch. 78, § 1; 1977, ch. 188, § 1.)

§ 1-13-106. *Same; authority of supreme court.*

The supreme court may answer questions of law certified to it by a federal court when requested by the certifying court if there are involved in any proceeding before the federal court questions of law of this state which may be determinative of the cause then pending in the federal court, and as to which it appears to the federal court there

is no controlling precedent in the existing decisions of the supreme court. (Laws 1975, ch. 78, § 1; 1977, ch. 188, § 1.)

§ 1-13-107. *Same; rules.*

The Supreme Court may adopt rules of practice and procedure to implement or otherwise facilitate utilization of certificate procedure. (Laws 1975, ch. 78, § 1; 1977, ch. 188, § 1.)

Wyoming Rules of Appellate Procedure
Rule 11

Rule 11. Certification by Federal Courts of Questions of Law

Rule 11.01. ***Power to answer.***

The Supreme Court may answer questions of law certified to it by a federal court when requested by the certifying court, if there is involved in any proceeding before it a question of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

Rule 11.02. ***Method of invoking.***

Rule 11, W.R.A.P., may be invoked by an order of any of the courts referred to in Rule 11.01, W.R.A.P., upon said court's own motion or upon the motion of any party to the cause.

Rule 11.03. ***Contents of certification order.***

A certification order shall set forth the question of law to be answered; and a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Rule 11.04. ***Preparation of certification order.***

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court

may require the original or copies of all or of any portion of the record before the certifying court to be filed under the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

Rule 11.05. *Costs.*

Fees and costs shall be the same as in civil appeals docketed before Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Rule 11.06. *Briefs and argument.*

Upon the agreement of the Supreme Court to answer the questions certified to it, notice shall be given to all parties. The plaintiff in the trial court, or the appealing party in the appellate court shall file his brief within thirty (30) days from the date of receipt of the notice, and the opposing party within thirty (30) days from service upon him of copies of plaintiff/appellant's brief. Brief shall be in the manner and form of briefs as provided in Rule 5, W.R.A.P. Oral arguments shall be as provided in Rule 6, W.R.A.P.

Rule 11.07. *Opinion.*

The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.